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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

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PRESBYTERIAN CHURCH IN THE UNITED STATES and J. LEHMON BRANTLEY, Chairman of the Administrative Commission of the Presbytery of Savannah,

Appellants,

vs.

MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH,

Appellee,

and

PRESBYTERIAN CHURCH IN THE UNITED STATES and J. LEHMON BRANTLEY, Chairman of the Administrative Commission of the Presbytery of Savannah,

Appellants,

vs.

EASTERN HEIGHTS PRESBYTERIAN CHURCH and FRANK L. PERRY SR., JOHN BRUNING, LESTER R. SARGENT, HARDIN C. NORMAN and ARMIN S. HUBERT, Trustees,

Appellees.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE RIGHT REVEREND JOHN E. HINES, PRESIDING BISHOP OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

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No. 1380

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The Presiding Bishop respectfully moves for leave to file a brief amicus curiae in support of the Appellants in these causes.

In support of such motion the Presiding Bishop respectfully states as follows:

INTEREST OF AMICUS CURIAE

The Protestant Episcopal Church in the United States, hereinafter called the Episcopal Church, like the Presbyterian Church in the United States, is a hierarchical church in that it is an organized ecclesiastical body the General Convention of which is charged with the government of the church (Constitution and Canons, copies of which are submitted with this brief).

On the termination of the War of Independence and the acknowledgment by Great Britain of the independence of America, difficulty arose. Relief was obtained by the passing of an act of Parliament allowing the Bishop of London to ordain, without requiring promises of allegiance to the British crown, several men who had gone to England for that purpose. This was but a partial relief and the need of an episcopate was now more felt than before the war. The Church was destitute of unity, government, provision for its clergy and incapable of acting to any advantage or preserving uniformity in the public services.

To remedy these evils a meeting was held in May, 1784, of a few clergy from New York, New Jersey and Pennsylvania, at which another meeting was called in the following October in New York. Resort was thereafter had to the Church in Scotland, where Samuel Seabury received consecration as a bishop in November, 1784.

Two subsequent General Conventions were held in 1785 and 1786.

Dr. Provost and Dr. White having been elected Bishops of New York and of Pennsylvania, and Dr. Griffith Bishop of Virginia, testimonials in their favor were signed by the Convention. The two former sailed for England in Novem-

ber, 1786, and were consecrated at Lambeth, and in the following year Dr. Griffith was consecrated by the Archbishop of Canterbury.

There being then three bishops, the General Convention again assembled in July, 1789, and adopted the Constitution and Canons, as subsequently amended and supplemented at subsequent General Conventions.

At the General Convention of 1967 the following preamble of the Constiiution was adopted:

> "The Protestant Episcopal Church in the United States of America, otherwise known as The Episcopal Church (which name is hereby recognized as also designating the Church), is a constituent member of the Anglican Communion, a Fellowship within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Book of Common Prayer. This Constitution, adopted in General Convention in Philadelphia in October, 1789, as amended in subsequent General Conventions, sets forth the basic Articles for the government of this Church, and of its overseas missionary jurisdictions."

Furthermore, in the preface to the Book of Common Prayer adopted at the General Convention of 1789, these words are found:

> "It seems unnecessary to enumerate all the different alterations and amendments. They will appear, and it is to be hoped, the reasons of them also, upon a comparison of this with the Book of Common Prayer of the Church of England. In which it will also appear that this Church is far from intending to depart from the Church of England in any essential point of doctrine, discipline, or worship; or further than local circumstances require."

There have at all times been three orders of the clergy: bishops, presbyters and deacons; while the General Convention consists of a House of Bishops and a House of Clerical and Lay Deputies elected by the several dioceses

and missionary districts, bringing the church within the definition of a hierarchy as defined in Webster's Collegiate Dictionary as a body of officials (esp. ecclesiastical) in successive ranks or government by such a body.

The church itself is divided into dioceses and missionary districts presided over by a bishop, each holding an annual convention or convocation presided over by the bishop, made up of clerical and lay delegates elected by each parish and mission having, subject to the Constitution and Canons of General Convention, legislative powers for the government of the diocese or missionary district.

In 1570 an Act of Parliament forbade all leases, gifts, grants, feoffments and conveyances of real property devoted to religious uses "other than for the Term of one and twenty Years, or three lives, from the Time as such Lease or Grant shall be made or granted". 13 Eliza. c 10.

The purpose of the act is stated in the preamble and is germane to the situation presented by these causes as it was to the conditions in England four centuries ago which it was enacted to correct.

Those in possession of property devoted to religious and charitable uses were allowing the fabric to fall into disrepair and then selling the lead and other building material. They were also conveying property to third parties, and thereby diverting it from the use to which it had been solemnly dedicated. Such conveyances, except as expressly authorized by the statute of Elizabeth, were thereafter forbidden.

Just prior to the American Revolution a statute was enacted, 5 Geo. III, 17, which affirmed leases made in accordance with the statute of Elizabeth and re-enacted the same limitations.

The statute of Elizabeth and subsequent statutes to the same effect have been held to constitute a part of our common law. (*M. A. Baptist Church* v. *Baptist Church in O. St.*, 46 N. Y. 131, 141). This has been demonstrated historically by the fact that prior to the enactment of

Chapter 43 of the Laws of 1806, which has come down to us in Section 12 of the Religious Corporations Law of New York it was necessary for the trustees of a religious corporation to petition the Legislature and ask the passage of a special act before they could sell any real property belonging to the corporation.

The line of such special acts stretching from 1703 to 1806 shows church property at common law can only be diverted to other uses pursuant to a special act of the Legislature.

The acts of Elizabeth and George III were in line with the tradition of the church in England that upon consecration of a church it became the property of the saint in whose name it was consecrated.

The rule of inalienability has been codified in Canon 6, Sec. 3 of the General Canons, as follows:

> "Sec. 3 No Vestry, Trustee or other body, authorized by Civil or Canon law to hold, manage or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the consent of the Bishop and Standing Committee of the Diocese, or the Bishop and Council of Advice of the Missionary District, of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese or Missionary District."

The Book of Common Prayer of the Episcopal Church contains a service entitled "The Form of Consecration of a Church or Chapel." At page 566 the following rubric is found:

> "Then, the Bishop sitting in his chair, the Sentence of Consecration is to be read by some person appointed by him, and then laid by him upon the Communion Table; after which, the Bishop shall say,
>
> " 'Blessed be thy Name, O Lord, that it hath pleased thee to put into the hearts of thy servants to appropriate and devote this house to thy honour and worship; and grant that all who shall enjoy the

benefit of this pious work, may show forth their thankfulness by making a right use of it, to the glory of thy blessed Name; through Jesus Christ our Lord. Amen.' "

A copy of the instrument of donation by the rector, wardens and vestrymen of the parish and of the sentence of consecration are annexed hereto as Appendix 1 and 2.

In *Fiske v. Beatty*, 206 App. Div. 349, aff'd 238 N. Y. 598, which involved the power of a bishop to refuse to institute a priest as rector of a parish under General Canon 39 (now 46), the Appellate Division wrote as follows:

> "The true doctrine of the Protestant Episcopal Church in America, in relation to the sources of power of a priest or rector, as we understand it, is correctly expressed as follows: 'In the Church, power does not *ascend* from the congregation or the vestry to the rector; it *descends* from above to the Bishop and through the Bishop to the subordinate ministry' (White's Church Law (ed. 1898) 185)." (p. 356, emphasis in original)

In *Rector, etc., of Church of Holy Trinity* v. *Melish*, 194 Misc. 1006, aff'd 276 App. Div. 1088, leave to appeal denied 277 App. Div. 783, appeal dismissed 301 N. Y. 679, certiorari denied 340 U. S. 936, which involved the power of the bishop to dissolve the pastoral relationship between a rector and an incorporated parish under present Canon 30 of the diocesan canons (appendix 3 to this brief) the Special Term at page 1016 quoted and relied upon the decision of this Court in *Watson* v. *Jones*, 80 (13 Wall) U. S. 679.

ARGUMENT

The opinion of the Supreme Court of Georgia in the causes now under review is in direct conflict with decisions of this Court, *Watson* v. *Jones, supra, Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94; *Kreshik* v. *St. Nicholas Cathedral,* 363 U. S. 190.

The facts in these causes are fully stated in the petition for the writ of certiorari, to which the amicus curiae begs leave to refer as if incorporated herein.

Rather than submit a lengthy brief upon the facts and law, the amicus curiae joins in all that is stated in the brief submitted by the appellants, adding only the vital importance of the decision of this Court to this hierarchical church.

Affirmance would vest in contumacious congregations the right of secession from the national church of any parish dissatisfied with an action of the governing body to which the Constitution and Canons of the Episcopal Church subject them, and destroy its hierarchical nature and quality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JACKSON A. DYKMAN, of counsel for the Presiding Bishop, hereby certify that I have served a copy of the foregoing petition by depositing a copy of the same in the United States mail, properly stamped and addressed to each of the following:

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this 16th day of July, 1968.

JACKSON A. DYKMAN

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Jackson A. Dykman